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No. 84-115

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Califano v. *Sanders*, 430 U.S. 99 4
Finnegan v. *Matthews*, 641 F.2d 1340 ..... 2, 5, 6
Heckler v. *Ringer*, No. 82-1772 (May 14, 1984) 4
Mathews v. *Eldridge*, 424 U.S. 319 5
Patti v. *Schweiker*, 669 F.2d 582 ..... 2, 3, 5, 6
United States v. *Mendoza*, No. 82-849 (Jan. 10, 1984) 6
United States v. *Munsingwear, Inc.*, 340 U.S. 36 5
Weinberger v. *Salfi*, 422 U.S. 749 5

Statutes:

Social Security Act, Tit. II, 42 U.S.C. 401 *et seq.* 2
§ 205(g), 42 U.S.C. 405(g) 4
§ 223(f), 42 U.S.C. 423(f) 3
§ 223(f)(2), 42 U.S.C. 423(f)(2) 3
Social Security Act, Tit. XIV, 42 U.S.C. 1381 *et seq.* 2
§ 1614(a)(5) (42 U.S.C. 1382c(a)) 3
§ 1614(a)(5)(B) (42 U.S.C. 1382c(a)) 3
§ 1614(a)(5)(C) (42 U.S.C. 1382c(a)) 3
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* 1
§ 2, 98 Stat. 1794 2
§ 2(a), 98 Stat. 1794 3
§ 2(c), 98 Stat. 1796 3
§ 2(d), 98 Stat. 1797 ..... 1-2, 3, 8
§ 2(d)(2)(C), 98 Stat. 1797 8
§ 2(d)(3), 98 Stat. 1798 8

Miscellaneous:

130 Cong. Rec. (daily ed. Sept. 19, 1984):
p. H. 9831 6
pp. S11454-S11455 6
S. Rep. 98-466, 98th Cong., 2d Sess. (1984) 6

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The Solicitor General, on behalf of the Secretary of Health and Human Services, files this brief in reply to several arguments made by respondents in their brief in opposition, including the effect on this case of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*

This case is for present purposes identical to *Heckler* v. *Kuehner*, No. 83-1593. On November 5, 1984, the Court granted the petition for a writ of certiorari filed on behalf of the Secretary in *Kuehner*, vacated the judgment of the court of appeals in that case, and remanded with instructions for the district court to remand the cases of the named and unnamed class members to the Secretary in accordance with the requirements of Section

2(d) of the 1984 Act. We respectfully submit that the Court should enter a similar order in this case.

A.

1. Respondents filed this class action on February 4, 1983 to challenge the evidentiary standards utilized by the Secretary in determining whether a recipient of disability benefits under Title II or Title XVI of the Social Security Act (42 U.S.C. 401 *et seq.*, 1381 *et seq.*) continues to be entitled to receive benefits. They contended that the prior finding that an individual was disabled gives rise to a presumption that he is still disabled and that the Secretary may not terminate the payment of disability benefits to an individual unless she establishes that the individual's medical condition has improved. Respondents argued that the Secretary was required to adopt this "medical improvement" standard under two decisions of the Ninth Circuit, *Finnegan* v. *Matthews*, 641 F.2d 1340 (1981), and *Patti* v. *Schweiker*, 669 F.2d 582 (1982). See generally Pet. 7-14. In the petition for a writ of certiorari, we sought review of the court of appeals' holding that the district court could exercise jurisdiction over the claims of class members who received adverse administrative decisions more than 60 days before this suit was filed but who did not seek further administrative or judicial review of those decisions within the 60 days allowed under the Act and implementing regulations. See Pet. I, 3, 15-29.

2. As we explain in our supplemental brief in *Heckler* v. *Kuehner* (at 3-5),[1] in Section 2 of the Social Security Disability Benefits Reform Act of 1984, Congress addressed and resolved the controversy surrounding the "medical improvement" issue by adopting detailed stand-

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[1] We have furnished counsel for respondents with a copy of our supplemental brief in *Kuehner*.

ards for the termination of disability benefits.[2] In addition, as respondents concede (Br. in Opp. 7), Congress provided in Section 2(d) of the 1984 Act that the cases of all named and unnamed class members in a certified class action "relating to medical improvement" must be remanded to the Secretary, who will then provide an opportunity for those cases to be reopened and reviewed under the new statutory standards. See *Kuehner* Supp. Br. 5-10. This Court implemented that statutory remand requirement in *Kuehner* by ordering that the cases of

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[2] Respondents' provocative assertion (Br. in Opp. 6) that Congress acted to "rectify" the Secretary's "defiance" of judicial precedent by adopting statutory standards that essentially codify the holdings of various courts of appeals on the medical improvement issue is plainly wrong for three reasons. First, Congress in fact declined to enact a requirement that the Secretary "acquiesce" in the decisions of the courts of appeals. See note 4, *infra*. Second, the legislative history of the 1984 Act shows that Congress recognized that the Social Security Act previously did not impose special standards for continuing disability reviews. See *Kuehner* Supp. Br. 3 n.1.

Third, the standards Congress prescribed in the 1984 Act differ in a number of material respects from the medical improvement standard fashioned by the courts of appeals under prior law. For example, although a number of courts of appeals (including the Ninth Circuit in *Patti*) had held that a recipient was entitled to a presumption of continuing disability (see *Kuehner* Supp. Br. 4 n.2), Congress rejected such a presumption in the 1984 Act. Congress instead provided that a determination of continuing eligibility shall be made "on a neutral basis" and "without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been found to be disabled." See Sections 223(f) and 1614(a)(5) of the Social Security Act, as added by Sections 2(a) and (c) of the 1984 Act; *Kuehner* Supp. Br. 5, 4a, 7a. Moreover, Congress specified several exceptions —which were not recognized in many of the court of appeals decisions—in which the Secretary may terminate benefits even in the absence of substantial evidence of medical improvement in the individual's impairment. Sections 223(f)(2)-(3) and 1614(a)(5)(B)-(C) of the Social Security Act, as added by Sections 2(a) and (c) of the 1984 Act. See *Kuehner* Supp. Br. 4-5, 2a-3a, 5a-6a.

individual class members be remanded to the Secretary. Because this class action also is one "relating to medical improvement," the Court should enter a similar order in this case.

B.

Several other arguments made by respondents in the brief in opposition also warrants a short reply.

1. Respondents contend (Br. in Opp. 1, 8-9, 11) that the petition for a writ of certiorari seeking review of the court of appeals' jurisdictional holding should be denied because Congress has now provided the special statutory remand procedure for the class members in this case without regard to whether they have satisfied the exhaustion and 60-day time limit requirements under 42 U.S.C. 405(g). The respondents in *Kuehner* argued that certiorari should be denied for the same reason (*Kuehner* Resp. Supp. Br. 5, 10, 13, 14), but the Court rejected that argument and instead granted the Secretary's petition for a writ of certiorari and vacated the judgment of the court of appeals. There is no reason for a different disposition here.

As we explain in the petition (Pet. 15-29), the decision of the court of appeals in this case—which requires the reopening of thousands of administrative decisions that the claimants had allowed to become final and binding by not seeking further review within 60 days—is flatly inconsistent with the text of 42 U.S.C. 405(g), implementing regulations of the Secretary, and this Court's unanimous decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977). Indeed, the Court already has twice granted a stay as to these class members. *Heckler* v. *Lopez*, No. A-145 (Sept. 9 and Oct. 11, 1983); *Heckler* v. *Lopez*, No. A-707 (Apr. 30, 1984).[3] Moreover, the legislative

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[3] Similarly, the court of appeals' decision dispensing with the exhaustion requirement cannot be reconciled with this Court's decisions in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984);

history of the 1984 Act makes clear that the special remand procedure creates a limited statutory exception to the exhaustion and time limit requirements that otherwise would apply and that Congress enacted this special procedure only in order to terminate the disruptive class action litigation on the "medical improvement" issue. See *Kuehner* Supp. Br. 7-8 & nn. 7, 8. There should be no suggestion that the court of appeals' decision, which flouts the rulings of this Court, might be precedent for permitting a court to ignore the 60-day limitation in 42 U.S.C. 405(g) where Congress has not enacted a special exception. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

2. Respondents contend (Br. in Opp. 8-9 n.5) that further litigation is required in district court in this case with regard to "substantive matters" other than the medical improvement issue. But the only such "substantive matter" they identify is whether it was permissible for the Secretary not to "acquiesce" in the Ninth Circuit's decisions in *Finnegan* and *Patti* with regard to the evidentiary standards to be applied in reviewing the continuing eligibility of individuals receiving disabilty benefits. That issue has been rendered moot by the 1984 Act, because Congress has now prescribed specific statutory standards to be followed in conducting such reviews and directed that those new standards be applied in the review of *all* benefit claims, including those of members of certified classes. Whether the Secretary should have fol-

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Mathews v. *Eldridge*, 424 U.S. 319 (1976); and *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). See Pet. 15, 19-20 n.13. The Solicitor General decided not to seek review of that holding, however, because of the pendency of the disability legislation before Congress to resolve the medical improvement issue, the preliminary nature of the district court's relief, and the fact that most persons whose claims still were pending before the Secretary would have their cases considered under the Ninth Circuit's "medical improvement" standard in any event by virtue of paragraphs 4(a) and (b) of the district court's order, which had not been stayed. See Pet. 10, 29 n.18.

lowed the approach of *Finnegan* and *Patti* prior to passage of the 1984 Act therefore is irrelevant.[4]

Furthermore, because the 1984 Act and this Court's order in *Kuehner* require that the cases of the named and unnamed class members be remanded forthwith to the Secretary, there will be no remaining jurisdictional basis for adjudicating the non-acquiescence issue in district court. A class action is essentially an aggregation of individual actions brought on behalf of the members of the class; the statutory remand of the cases of all class members to the Secretary for new administrative proceedings leaves no such cases in the court in connection with which respondents can litigate other "issues" that might have been raised in support of a particular class member's claim for benefits under prior law.

3. Finally, respondents offer the cryptic comment (Br. in Opp. 10 n.6) that this case differs from *Kuehner* and that some other disposition therefore might be appropriate here. But they do not identify any such differences. Nor can we conceive of any that would warrant

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[4] We note as well that Congress declined to include in the 1984 Act a provision that would have required the Secretary, as a statutory matter, to "acquiesce" within the circuit in the decision of a court of appeals. 130 Cong. Rec. H9831 (daily ed. Sept. 19, 1984) (Joint Explanatory Statement of the Committee of Conference). See also *id.* at S11454-S11455; S. Rep. 98-466, 90th Cong., 2d Sess. 21 (1984). Even assuming the issue were not moot, respondents therefore could succeed on their "nonacquiescence" argument only if the Secretary were *constitutionally* required to apply the judgment of a court in a case involving a single individual to all other individuals in the circuit. As respondents appear to acknowledge (Br. in Opp. 4 n.3), that submission would require as a constitutional matter the application of the rule of nonmutual collateral estoppel against the government that the Court unanimously rejected in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984). Perhaps for this reason, the Court was not receptive to respondents' constitutional argument in the stay proceedings in this case. See *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 8-9 (Rehnquist Circuit Justice); (Oct. 11, 1983), slip op. 6 (Stevens, J., concurring and dissenting).

a departure from the clear statutory command, enforced by this Court in *Kuehner*, that the cases of named and unnamed class members be remanded immediately to the Secretary after resolution by the district court of any questions regarding the definition and scope of the class.

Perhaps respondents intend to rely on the fact that in this case, the Secretary has implemented the district court's preliminary injunction with regard to those class members for whom that injunction was not stayed pending appeal or certiorari and that there have been some proceedings in district court in connection with that implementation, while in *Kuehner* there had been no such implementation because the district court dismissed the complaint for lack of jurisdiction. Whatever the force of that distinction, however, it has no application to the class members whose cases are before this Court—*i.e.*, the class members for whom an adverse administrative decision became final and binding before this class action was filed. This Court has twice granted a stay of the implementation of the district court's preliminary injunction as applied to these class members. Because they have not been given an opportunity under the district court's order to have their cases reopened and to be reinstated to benefits pending that process, they are, for present purposes, indistinguishable from the class members before the Court in *Kuehner*.[5] The Court therefore should

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[5] Even as regards other class members, the past proceedings in district court in this case furnish no basis for the district court to disregard the 1984 Act in the future. Congress specified that the new statutory standards for reviewing continuing eligibility must be applied to *all* pending cases—including those of the class members in all class actions whose cases were not finally disposed of under the court's order prior to the enactment of the 1984 Act, whether or not the court might previously have ordered that the individual's claim for benefits be reopened and reviewed under some other substantive standard or judicially fashioned procedures. The duty of the Secretary and the district court is to apply the 1984 Act to all pending cases in whatever status they happened to be on the date the 1984 Act was signed into law. Of course, if the court-

dispose of the petition in this case in the same manner as it disposed of the petition in *Kuehner*.

CONCLUSION

For the foregoing reasons, we suggest that the Court enter the following order in this case:

> The petition for a writ of certiorari is granted. The judgment is vacated insofar as it affirms the exercise of jurisdiction over the case of any class member who received an administrative decision prior to December 6, 1982 that his disability had ceased and who did not seek further administrative or judicial review of that decision within 60 days. The case is remanded to the United States Court of Appeals for the Ninth Circuit to be remanded to the United States District Court for the Central District of California with instructions to: (i) remand the cases of the named respondents to the Secretary for review pursuant to Section 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (ii) make any necessary clarifications in the definition and scope of the class; (iii) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to Section 2(d)(3) of that Act; and (iv) take other actions appropriate in light of that Act.

Respectfully submitted.

REX E. LEE
Solicitior General

NOVEMBER 1984

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ordered review of a particular class member's claim for benefits was completed prior to passage of the 1984 Act and the class member was found to be disabled, that favorable decision will not be reopened and readjudicated under Section 2(d) of the 1984 Act.

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